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No.88-1444

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

MICHAELA BERESTEANU GOLIN,

Petitioner,

v.

FMC CORPORATION and GEORGE E. MOEHRINGER.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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The respondent company's brief in opposition, filed on or about April 3, 1989, ["Opp.Br."], fails almost completely to meet the contentions made in the petition for a writ of certiorari. ["Petition"]. In addition, the company's brief at a number of places misstates the record and misconceives the applicable law.

In this reply brief, the peti-

tioner shall endeavor to correct some of the respondent's most glaring misrepresentations and misconceptions.

I. THE RESPONDENT MISCONCEIVES THE TITLE VII PRE-EMPTION ISSUE

The company's position rests on a number of basic errors which go to the heart of the case.

First, the company, one of the defendants below, urges that Title VII pre-empts petitioner's tort and contract claims despite the holdings of the Eighth Circuit and the New Jersey Supreme Court. (Opp.Br. 23-28). No authority is cited in support of this viewpoint. The respondent merely struggles to distinguish the case at bar from Lucas v. Brown & Root, Inc., 736 F.2d 1202 (CA8 1984); Velantzas v. Colgate-Palmolive Co., 109 N.J. 89, 536 A.2d 237 (1988); Giudice v. Drew Chemical Corp., 104 N.J. 465, 517 A.2d 448 (1986).

The company's argument is wholly without merit.

The defendant urges that Lucas v. Brown & Root is inapplicable on the ground that "[t]here, plaintiff's Title VII claim was dismissed as untimely. Plaintiff was permitted to pursue wrongful discharge claims." (Opp.Br. 24-25).

The respondent ignores the fact that Golin's Title VII claims also were dismissed by the trial judge, and therefore, like the plaintiff in Lucas, the petitioner should be permitted to bring her wrongful discharge tort and contract claims before the jury.

Without stating so directly, the respondent in fact implies that a cause of action in contract and tort for a discharge in violation of the clear mandate of public policy expressed in

Title VII cannot "co-exist" with the Title VII claim itself. To the contrary, in Lucas, the Eighth Circuit has emphasized that "Title VII does not preempt this state-law contract [and tort] claim." Lucas, 736 F.2d at 1206. The respondent does not allege that the common law claims pre-empt the Title VII claim. Therefore, its attempt to distinguish Lucas from the instant case is based on a fallacy.

Similarly, the respondent attempts to distinguish Velantzas v. Colgate-Palmolive on the ground that "Velantzas apparently never pleaded a statutory violation for discrimination and therefore, the issue whether separate claims for statutory violations and wrongful discharge could co-exist was never raised." (Opp.Br. 24).

The respondent fails to give page references in support of its contention that the plaintiff in Velantzas never pleaded a statutory violation for discrimination, and petitioner has been unable to find any. The New Jersey Supreme Court in Velantzas made it clear that an at-will employee discharged because of sex discrimination or in retaliation for pressing a sex discrimination claim may pursue a cause of action in contract or tort or both against the employer, because such discharge is in violation of the clear mandate of public policy expressed in Title VII and its state equivalent. See Velantzas, 109 N.J. 189, 536 A.2d 237, 238 & n.1. See also, e.g., Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505, 512 (1980). The defendant fails to explain, and this petitioner is unable to see, on

what grounds the New Jersey Supreme Court could possibly have precluded the plaintiff from seeking redress independently under Title VII and its state equivalent. The respondent's suggestion, without any supporting authority, that Title VII claims and common law wrongful discharge tort and contract claims cannot "co-exist" is based on a fallacy.

Finally, the defendant contends that Giudice v. Drew Chemical is inapplicable because Giudice "did not involve a discrimination issue." (Opp.Br. 24).

Contrary to the respondent's contention, Giudice involved a discrimination issue. The plaintiff in Giudice was discharged for complaining about a fellow employee's sexual harassment on the job. Such discharge constitutes discrimination in violation of Title VII. See, e.g., Rucker v. Higher Educational

Aids Board, 669 F.2d 1179, 1182 (CA7 1982).

In conclusion, Lucas, Velantzas and Giudice are applicable here. Petitioner was terminated in retaliation for complaining to defendant's upper management about her supervisor's sexual advances and for filing a sex discrimination charge with the FEP agencies. (Petition 26). The trial judge dismissed the Title VII retaliation claim. (Appendix to Petition ["App."] 63a-64a). Petitioner should be permitted to bring before the jury the breach of contract and the wrongful discharge tort claims which arise out of the same nucleus of facts.

II. THE RESPONDENT FAILS TO MEET PETITIONER'S CONTENTION THAT THE TRIAL JUDGE ERRONEOUSLY EXCLUDED SIGNIFICANT CORROBORATING AND IMPEACHING EVIDENCE

The respondent quotes the trial judge's holding that "the testimony of

the plaintiff was not worthy of belief" while "the testimony of the defendants' witnesses was credible." (Opp.Br. 20, 38). Yet the defendant's brief ignores petitioner's argument that the trial judge improperly excluded the evidence offered by the plaintiff to corroborate her testimony and to impeach the defendants' witnesses. (Petition 45).

In itself, the judge's failure to permit the impeachment of a witness is reversible error. See, e.g., Wilson v. City of Aliceville, 779 F.2d 631, 637 (CA11 1986).

In addition, where, as here, "the finder of fact proceeds upon a faulty theory to assess credibility, its finding based solely upon that assessment cannot stand." Henson v. City of Dundee, 682 F.2d 897, 912 (CA11 1982) (citation omitted). See also, e.g., Griffin v. City

of Omaha, 785 F.2d 620, 626 (CA8 1986); Marable v. H. Walker & Associates, 644 F.2d 390, 395-397 (CA5 1981).

III. THE RESPONDENT MISCONCEIVES THE DUTY OF THE TRIAL JUDGE TO ADEQUATELY INSTRUCT THE JURY IN RESPONSE TO QUESTIONS

The company contends that "[t]he fact that the jury expressed difficulty in understanding the term 'malicious' [interference] is of no significance. When they requested clarification of the term and the judge re-read the jury charge, the matter was ultimately resolved and the jury continued to deliberate and subsequently reached a verdict. They did not request or need additional clarification. No prejudicial error occurred." (Opp.Br. 56-57).

Contrary to the respondent's contention, the law is settled that "[w]here, as here, a jury makes known its

difficulty and requests further instructions on the law applicable to an important issue, the trial judge is required to give such supplemental instructions as may be necessary to guide it in the determination of the issue. A perfunctory re-reading of the very instructions which may have led to the difficulty does not fulfill the requirement." Walsh v. Miehle-Goss-Dexter, Inc., 378 F.2d 409, 415 (CA3 1967) (citations omitted) (emphasis added).

IV. THE RESPONDENT MISCONCEIVES THE TRIAL JUDGE'S DISCRETION IN CONDUCTING THE PROSPECTIVE JURORS' VOIR DIRE EXAMINATION

The company boldly asserts that "in the case at bar, the court has questioned the prospective jurors concerning their backgrounds as well as their attitudes about subjects germane to the issues at hand and whether they can be fair

and impartial. *** [Therefore], the court has fairly exercised its serious duty enabling the parties to assist the court in empanelling a fair and impartial jury." (Opp.Br. 50-52).

Contrary to the respondent's assertion, it is reversible error for the court to limit the voir dire to the so-called "stock questions" that were asked in this case (name, address, occupation, etc.), even though the court also inquired whether the jurors believed they could be impartial. See, e.g., Art Press, Ltd. v. Western Printing Machinery Co., 791 F.2d 616, 619 (CA7 1986); Darbin v. Nourse, 664 F.2d 1109, 1112 (CA9 1981).

Additionally, there was no objection here to plaintiff's proposed questions on voir dire. The trial judge rejected plaintiff's questions allegedly in order to expedite the jury selection

process and to "keep it moving as quickly as we can." (Partial Transcript of Jury Selection, p. 10). In itself, the rejection by a trial judge of proposed voir dire questions for such erroneous reasons is reversible error. Kiernan v. Van Schaik, 347 F.2d 775, 779 (CA3 1965).

Equally bold is the company's assertion that the "[petitioner] expressed satisfaction with the jury empanelled." (Opp.Br. 52). To the contrary, the record shows that petitioner expressed great concern with the inadequate selection process. Shortly after the jury selection, plaintiff filed an affirmation of bias and prejudice where she explained that "because the Honorable Garrett E. Brown, Jr. did not ask several questions that plaintiff considers necessary for fully exercising her challenges, plaintiff believes that the Court has not

fulfilled its duty to impanel an impartial jury." (Affirmation of Bias and Prejudice, District Court Pleading Number 84, filed on January 13, 1987, page 2, paragraph 4) (emphasis added).

V. THE RESPONDENT MISCONCEIVES THE RECUSAL ISSUE

The respondent contends that plaintiff's affirmation of bias and prejudice was not timely. (Opp.Br. 44). This contention is based on an obsolete provision of 28 U.S.C. § 144 that the affidavit "be filed not less that ten days before the beginning of the term *** at which the proceeding is to be heard." (Opp.Br. 44).

It is well settled that this provision no longer can be applied, because the terms of the court were abolished in 1963. See 28 U.S.C. § 138. What is now required is reasonable diligence.

Plaintiff's affirmation of bias and prejudice, filed prior to the presentation of any testimony in this action on the basis of statements allegedly made by the trial judge six days before, was timely. See, e.g., United States v. Townsend, 478 F.2d 1072, 1073 (CA3 1973); Potashnick v. Port City Const. Co., 609 F.2d 1101, 1115 (CA5), cert. denied, 449 U.S. 820 (1980); SCA Services, Inc. v. Morgan, 557 F.2d 110, 117 (CA7 1977).

The respondent contends that Golin's "allegations do not in any way rise to the level of proving any personal bias or prejudice on the part of the [trial judge]." (Opp.Br. 47). Yet the defendant's brief fails to address most of the petitioner's allegations. (Petition 40-45).

Furthermore, contrary to the defendant's contentions, the sufficiency

and timeliness of plaintiff's affirmation of bias and prejudice are not at issue. Under 28 U.S.C. § 455, a district judge has a continuing duty to recuse himself, where, as here, he appears unable to "maintain that calm detachment necessary for fair adjudication." Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1970).

VI. THE RESPONDENT MISCONCEIVES THE TRIAL JUDGE'S DISCRETION IN PREVENTING THE PLAINTIFF FROM ANTICIPATING THE COURT'S INSTRUCTIONS

The defendant urges that "[i]t is not error to preclude discussion of the jury instructions and the law in the summation of a litigant." (Opp.Br. 55).

No authority is cited in support of this contention. Contrary to the respondent's contention, the requirement of Rule 51 of the Federal Rules of Civil Procedure that the judge inform the parties prior to final argument of his

action on the requested instructions has been adopted precisely to allow the parties to argue the instructions to the jury. See, e.g., Hetzel v. Jewel Companies, 457 F.2d 527, 535 (CA7 1972). See also London Guarantee & Accident Co. v. Woefle, 83 F.2d 325, 342 (CA8 1936).

Furthermore, where, as here, the plaintiff "was interrupted before she could complete her explanation as to what she believed the law to be, *** the court's ruling prejudiced plaintiff's case as she was not able to place the facts of the case within an appropriate framework from her perspective *** [and this] was error sufficient enough to warrant reversal." Sidorewicz v. Kostelny, 102 Ill.App.3d 851, 430 N.E.2d 377, 379 (Ill.App. 1981) (emphasis added).

VII. THE RESPONDENT MISCONCEIVES THE LATITUDE ALLOWED COUNSEL IN SUMMATION

The respondent boldly claims that the closing argument of the individual defendant's counsel "was based solely on characterizing the evidence of record and drawing reasonable inferences to ultimate facts which were fully supported by the evidence in the record." (Opp.Br. 53).

Contrary to the respondent's contention, there is not a scintilla of evidence in the record to support defense counsel's inflammatory remark in summation that plaintiff is, in essence, a malicious perjurer who manufactured the evidence. (11T22, 11T24, 11T45, 11T49). In itself, this unsupported comment constitutes reversible error. See, e.g., United States v. Grooms, 454 F.2d 1308, 1312 (CA7), cert. denied, 409 U.S. 858

(1972); United States v. Schartner, 426 F.2d 470, 478 (CA3 1970).

Similarly, nothing in the record supports defense counsel's remarks praising defendant Moehringer. (11T-47). To the contrary, Root testified that Moehringer was not a very good programmer (11T47); and Dvorak testified that she resigned because she didn't feel like putting up with Moehringer's harassment anymore (3T37). Vouching for one's witness constitutes reversible error. See, e.g., People v. Huff, 173 Mich. 620, 139 N.W. 1033, 1036 (1913); Mazza v. Winters, 95 N.J.Super. 71, 230 A.2d 139, 145 (App.Div. 1967); People v. Ford, 113 Ill.App.3d 659, 497 N.E.2d 564, 567 (Ill.App. 1983).

The respondent asserts that "[t]here is no error or bias demonstrated in that the [trial court] *** ordered

Petitioner not to interrupt with objections during the argument. The [trial judge] advised the Petitioner that all objections could be made after summation, and, in fact, did so permit." (Opp.Br. 54).

The respondent's contention is beside the point. The trial judge only permited the plaintiff to voice her objections after the jury had left the courtroom. (Petition 44).

As this Court has noted, "[t]he failure of the trial judge to sustain petitioner's objections or otherwise to make certain that the jury would disregard the appeal [to prejudice] could only have left them with the impression that they might properly be influenced by it in rendering their verdict, and thus its prejudicial effect was enhanced." New York Central R. R. Co. v. Johnson, 279

U.S. 310, 318 (1929).

CONCLUSION

The decision below raises important and recurring questions justifying the grant of certiorari.

In light of the respondent's inability to meet the issues presented in the petition without grossly distorting the applicable law and misstating the record, the need for this Court's review of the judgment below is indisputable. Indeed, petitioner respectfully suggests that summary reversal is now in order.

Respectfully submitted,

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April 10, 1989